Supreme Court, U.S.
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In The
Supreme Court of the United States
1996/97 Term

MACCAFERRI GABIONS, INC.,
Petitioners,

v.

WILKINSON & JENKINS CONSTRUCTION CO.,INC. and OHIO CASUALTY INSURANCE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTION PRESENTED

1. Whether a writ of certiorari should be issued to the U.S. Court of Appeals for the Eleventh Circuit to resolve a conflict among the Circuit Courts of Appeal and to avoid a conflict with the decisions of this Court concerning the contents of the notice materialmen who supply labor or materials to federal construction projects are required to provide a general contractor in order to maintain an action under the Miller Act, 40 U.S.C. § 270a *et seq.*?

LIST OF PARTIES

Pursuant to S.Ct. Rule 29.6, the following is a list of parties and each corporate party's respective parent corporation and subsidiaries, if any.

Petitioner:

1. MACCAFERRI GABIONS, INC.

    A. Parent Corporation: None

    B. Subsidiaries: None

    C. Affiliates: None

Respondents:

1. WILKINSON & JENKINS CONSTRUCTION CO., INC.

    A. Parent Corporation: None

    B. Subsidiaries: None

    C. Affiliates: None

2. OHIO CASUALTY INSURANCE COMPANY

    A. Parent Corporation: The Ohio Casualty Insurance Group

B. Subsidiaries: None

C. Affiliates: American Fire & Casualty Company and West American Insurance Company

Defendants:

1. DYNATERIA, INC.

   A. Parent Corporation: None

   B. Subsidiaries: None

   C. Affiliates: None

2. MOORE & ARTIS, LTD.

   A. Parent Corporation: None

   B. Subsidiaries: None

   C. Affilates: None

3. GARY CHAPMAN

4. RICHARD FIELDS

5. RUBEN S. HAM

6. ROBERT RUPERT (Third Party Defendant)

7. JAMES DOUGLAS SUGG, JR.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CITATIONS vi

OPINION BELOW 1

STATEMENT OF JURISDICTION 1

RULE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 5

I. A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL AND TO AVOID A CONFLICT WITH THE DECISIONS OF THIS COURT CONCERNING THE CONTENTS OF THE NOTICE MATERIALMEN WHO SUPPLY LABOR OR MATERIALS TO FEDERAL CONSTRUCTION PROJECTS ARE REQUIRED TO PROVIDE A GENERAL CONTRACTOR IN ORDER TO MAINTAIN AN ACTION UNDER THE MILLER ACT 5

Page

CONCLUSION 9

APPENDIX A - AUGUST 20, 1996 APPELLATE COURT OPINION . . . . . App. 1

APPENDIX B - NOVEMBER 14, 1996 APPELLATE COURT ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC . . . . . App. 29

APPENDIX C - JUNE 1, 1995 DISTRICT COURT ORDER ON REMAND AMENDING FINAL JUDGMENT . . . . . App. 31

APPENDIX D - AUGUST 24, 1994 FINAL JUDGMENT . . . . . App. 34

APPENDIX D - JULY 24, 1987 COLLECTION LETTER App.36

TABLE OF CITATIONS

Cases **Page**

Clifford F. MacEvoy Co. v. U.S. ex rel. Calvin Tomkins Co., 322 U.S. 102, 64 S.Ct. 890, 88 L.Ed. 1162 (1944) 3, 6

F.D. Rich Co. v. U.S. ex rel. Industrial Lumber Co., 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974) 3, 6, 7

Houston Fire & Cas. Ins. Co. v. U.S. ex rel. Trane Co., 217 F.2d 727 (5th Cir. 1954) 8

J.W. Bateson Co. v. U.S. ex rel. Bd. of Trustees, 434 U.S. 586, 98 S.Ct. 873, 55 L.Ed.2d 50 (1978) 3, 6

U.S. ex rel. Bailey v. Freethy, 469 F.2d 1348 (9th Cir. 1972) 8

U.S. ex rel. Charles R. Joyce & Son, Inc. v. F.A. Baehner, Inc., 326 F.2d 556 (2d Cir. 1964) 7, 8

U.S. ex rel. Consol. Elec. Distrib., Inc. v. Altech, Inc., 929 F.2d 1089 (5th Cir. 1991) 7

U.S. ex rel. Jinks Lumber Co. v. Federal Ins. Co., 452 F.2d 485 (5th Cir. 1971) 6

Page

U.S. ex rel. Moody v. American Ins. Co.,
835 F.2d 745 (10th Cir. 1987) 7, 8

U.S. ex rel. San Joaquin Blocklite v. Lloyd E. Tull, Inc.,
770 F.2d 862 (9th Cir. 1985) 7, 8

U.S. ex rel. Sherman v. Carter, 353 U.S. 210,
77 S.Ct. 793, 1 L.Ed.2d 776 (1957) 3, 6

Statues, Rules And Regulations

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1332 1

40 U.S.C. § 270a 1, 3, 5

40 U.S.C. § 270b 2, 5

OPINION BELOW

The August 20, 1996 opinion of the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") that gives rise to this petition is published at 91 F.3d 1431. It is also reprinted in Appendix A hereto at App. 1-28. By an Order dated November 14, 1996, the Eleventh Circuit denied a petition for rehearing and suggestion for rehearing en banc. This Order is reprinted in Appendix B at App. 29-30.

STATEMENT OF JURISDICTION

Petitioner, Maccaferri Gabions, Inc. ("Maccaferri") initiated this action in the U.S. District Court for the Southern District of Florida ("the District Court"). As Maccaferri sought relief under the Miller Act, 40 U.S.C. § 270a, *et seq.*, as well as Florida common law, it invoked the District Court's federal question and diversity jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1332. After a jury trial, on August 24, 1994 a Final Judgment was entered in Maccaferri's favor on its Miller Act, promissory estoppel and breach of third party beneficiary contract claims against Defendants Wilkinson & Jenkins Construction Co., ("W&J") and Ohio Casualty Insurance Co. ("Ohio Casualty").

Appeal was taken to the Eleventh Circuit pursuant to 28 U.S.C. § 1291. The Eleventh Circuit reversed on August 20, 1996. A timely petition for rehearing and suggestion for rehearing en banc was denied on November 14, 1996.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1). This Petition for Writ of Certiorari is

timely if filed within ninety (90) days of November 14, 1996, or by February 12, 1997.

RULE INVOLVED

40 U.S.C. § 270b(a) states in part:

> Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished is under Sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which the sum claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished.

STATEMENT OF THE CASE

This case represents a significant legal step backwards for materialman who supply products or labor for federal government projects. Although the Miller Act, 40 U.S.C. § 270a *et seq.* was enacted to protect materialmen, and although this Court has repeatedly held that the Act's purpose is "highly remedial" and should be applied "liberal[ly] . . . in order to effect Congressional intent to protect those whose labor and materials go into public projects" (*see e.g., J.W. Bateson Co. v. U.S. ex rel. Bd. of Trustees*, 434 U.S. 586, 594, 98 S.Ct. 873, 877-78, 55 L.Ed.2d 50 (1978); *F.D. Rich Co. v. U.S. ex rel. Industrial Lumber Co.*, 417 U.S. 116, 124, 94 S.Ct. 2157, 2162, 40 L.Ed.2d 703 (1974); *U.S. ex rel. Sherman v. Carter*, 353 U.S. 210, 216, 77 S.Ct. 793, 1 L.Ed.2d 776 (1957); *Clifford F. MacEvoy Co. v. U.S. ex rel. Calvin Tomkins Co.*, 322 U.S. 102, 107, 64 S.Ct. 890, 893, 88 L.Ed. 1162 (1944), the Eleventh Circuit has severely limited this remedial purpose by strictly construing the type of notice materialmen must give general contractors in order to maintain an action under the Act.

Specifically, on June 2, 1988, Maccaferri initiated this action against W&J and its surety, Ohio Casualty among others,[1] after Maccaferri did not receive payment for $57,226.16 worth of gabions it had supplied for use on a U.S. Army Corps of Engineers ("the Corps") flood control project

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[1] Among the parties to this action were Moore & Artis, Ltd. ("M&A"), the original subcontractor, and Dynateria, Inc. ("Dynateria"), M&A's surety. When M&A defaulted, Dynateria became the subcontractor. Maccaferri obtained judgments against M&A and Dynateria, but was never able to collect, because both M&A and Dynateria went into bankruptcy and/or were dissolved.

on Lake Okeechobee, Florida ("the project") and after it was promised that another $442,000.00 worth of gabions would be purchased to complete the project.[2]

Importantly, W&J not only modified its agreement with its subcontractor, M&A, to allow W&J to pay Maccaferri directly by joint checks made out Maccaferri and an escrow agent, but it also admitted to having guaranteed payment to Maccaferri. In addition, on July 24, 1987, Maccaferri sent the following letter to M&A:

> Our idea of a good collection letter is that it should be brief, friendly, and successful. This letter is brief, friendly, and it's (sic) success depends on you. The amount past due is $132,226.16. Thank you.

App. 36. The name and title of W&J's president, and W&J's own name and address, appeared on the bottom of the letter next to a notation, indicating that the letter had been addressed to W&J as well. App. 36. The letter also noted that duplicate invoices were enclosed. App. 36. W&J never denied receiving the letter, and five (5) days later, on July 29, 1987, W&J issued a check made out jointly to Maccaferri and the trustee in the amount of $74, 947.98, leaving outstanding the $57,226.16 that Maccaferri ultimately sued for under the Miller Act.

The case went to trial on July 12, 1994. On July 15, 1994, a jury returned a verdict in Maccaferri's favor on three (3)

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[2] Gabions are mesh baskets made of twisted, galvanized and pvc-coated wire that, when filled with stones, are used to control erosion on river banks, hillsides and beaches.

separate claims, including a $57,226.16 award against W&J and Ohio Casualty, jointly and severally, on Maccaferri's Miller Act claim. A Final Judgment was entered on August 16, 1994.

W&J and Ohio Casualty appealed, and, on August 20, 1996, the Eleventh Circuit issued an opinion reversing the jury's verdict on all three (3) counts, including the Miller Act claim, finding that the District Court should have granted W&J's and Ohio Casualty's motion for judgment as a matter of law.

On November 14, 1996, the Eleventh Circuit denied Maccaferri's Petition for Rehearing and Suggestion for Rehearing En Banc. App. 29-30.

REASONS FOR GRANTING THE WRIT

I. A WRIT OF CERTIORARI SHOULD ISSUE TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL AND TO AVOID A CONFLICT WITH THE DECISIONS OF THIS COURT CONCERNING THE CONTENTS OF THE NOTICE MATERIALMEN WHO SUPPLY PRODUCTS LABOR OR MATERIALS TO FEDERAL CONSTRUCTION PROJECTS ARE REQUIRED TO PROVIDE A GENERAL CONTRACTOR IN ORDER TO MAINTAIN AN ACTION UNDER THE MILLER ACT.

In order to succeed on a claim under the Miller Act, 40 U.S.C. § 270a *et seq.*, a materialman on a government construction project must give the general contractor written

notice of its claims within ninety (90) days of the last day on which it supplies materials for the project. 40 U.S.C. § 270b(a). It is the sufficiency of that notice that is at issue here.

In its decision, the Eleventh Circuit reversed the jury's verdict, finding that the evidence of notice proffered at trial was insufficient as a matter of law to allow Maccaferri to recover: "What is missing here is exactly what § 270b(a) was meant to provide: a *clear indication* from the materialman that it expects the general contractor to pay the balance due on the subcontractor's debt." App. 12 (Emphasis added). In addition, the Court emphasized that "[i]t is *crucial* that the notice state a claim directly against the general contractor, that the claim be stated with some specificity of the amount due, and that the claim specify the subcontractor allegedly in arrears." App. 9, *quoting*, *U.S. ex rel. Jinks Lumber Co. v. Federal Ins. Co.*, 452 F.2d 485, 488 (5th Cir. 1971) (Emphasis added). Moreover, the Court also emphasized the *strictness* of the contents of the notice -- in order to protect the general contractor. App. 9.

The Eleventh Circuit's decision is clearly at odds with this Court's pronouncement that the Act's purpose is "highly remedial" and should be applied "liberal[ly] . . . in order to effect Congressional intent to protect those whose labor and materials go into public projects" *See e.g.*, *J.W. Bateson Co.*, 434 U.S. at 594, 98 S.Ct. at 877-78; *F.D. Rich Co.*, 417 U.S. at 124, 94 S.Ct. at 2162; *Carter*, 353 U.S. at 216, 77 S.Ct. at 793; *Clifford F. MacEvoy Co.*, 322 U.S. at 107, 64 S.Ct. at 893. Indeed, the purpose of the Act is to protect the materialmen -- not the general contractors -- in order to

ensure that businesses will supply labor and materials for federal construction projects.[3]

In addition, the Eleventh Circuit's requirement of a "clear indication" from the materialman that it expects payment from the general contractor (*see* App. 12) conflicts with the holdings of other Circuits that such notice can be implied or inferred from the circumstances of each case. *See e.g.*, *U.S. ex rel. Consol. Elec. Distrib., Inc. v. Altech, Inc.*, 929 F.2d 1089, 1092-93 (5th Cir. 1991); *U.S. ex rel. Moody v. American Ins. Co.*, 835 F.2d 745, 748 (10th Cir. 1987); *U.S. ex rel. San Joaquin Blocklite v. Lloyd E. Tull, Inc.*, 770 F.2d 862, 865-66 (9th Cir. 1985); *U.S. ex rel. Charles R. Joyce & Son, Inc. v. F.A. Baehner, Inc.*, 326 F.2d 556, 559 (2d Cir. 1964).

For example, in *Altech, Inc.*, the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit") affirmed a lower court's finding on the sufficiency of notice where the supplier orally informed the general contractor that it had not been paid by the subcontractor and presented invoices detailing the outstanding charges, and where the general contractor sent a follow-up letter confirming that the materials provided by the supplier had been used on a federal project. 929 F.2d at 93. The Fifth Circuit found this evidence "indicates that the 'nature and state of the indebtedness was brought home to the general contractor.'" *Altech, Inc.*, 929 F.2d at 1093, *quoting*,

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[3] Because sovereign immunity prevents a lien from attaching to government property, and, therefore, deprives suppliers on government projects of their usual security interest, Congress enacted the Miller Act to provide an alternative remedy to protect the rights of these suppliers. *F.D. Rich Co.*, 417 U.S. at 121-22, 94 S.Ct. at 2161.

Houston Fire & Cas. Ins. Co. v. U.S. ex rel. Trane Co., 217 F.2d 727, 730 (5th Cir. 1954).

In *American Ins. Co.*, the U. S. Court of Appeals for the Tenth Circuit ("Tenth Circuit ") held that sufficient notice could be found from "several documents which individually may not have been sufficient, [but] were sufficient in combination because the contractor had actual notice of the amount due...the party liable for payment and the name of the contractor." 835 F.2d at 748.

Likewise, in *Lloyd E. Tull, Inc.* the U. S. Court of Appeals for the Ninth Circuit ("Ninth Circuit") found that a materialman's request to a general contractor for a joint-check, along with additional evidence about the of amount the subcontractor was in arrears, was sufficient to infer that the general contractor had notice that the materialman was looking to it for payment. 770 F.2d at 865-866, *citing*, *F.A. Baehner, Inc.*, 326 F.2d at 559; *see also U.S. ex rel. Bailey v. Freethy*, 469 F.2d 1348, 1351 (9th Cir. 1972) (letter sent to a general contractor asking for help in bringing a subcontractor's outstanding account up to date found to provide sufficient notice because "it might also be interpreted to request that the prime contractor directly give some help in bringing the account up to date by making the payment from the contractor's own or withheld funds.")

Thus, in light of the totality of the circumstances -- including W&J's guarantee of payment, its modification of the subcontract to allow for payment to Maccaferri by joint check, the July 24, 1987 collection letter addressed to both W&J and M&A, and W&J's payment of $74,947.98 only five (5) days later, among other evidence -- Maccaferri could surely satisfy

an "implied" or "inferred" notice standard, if not the strict requirement of the Eleventh Circuit that there be a "clear indication that the materialman expects payment directly from the general contractor. App. 9, 12. At a minimum, Maccaferri presented sufficient evidence to present the question to the jury, and its verdict should not have been disturbed. In holding otherwise, the Eleventh Circuit created a precedent that is contrary to the "highly remedial" purpose of the Miller Act -- which is to be applied "liberal[ly] . . . in order to effect Congressional intent to protect those whose labor and materials go into public projects" -- and in conflict with the law in the other Circuits.

CONCLUSION

Because of the Eleventh Circuit's decision, materialmen who supply labor or materials for federal construction projects -- especially small businesses that may be less familiar with the statutory scheme of the Miller Act and the case law thereunder -- now face greater obstacles to recover monies they are owed for their labor and materials. As a result, materialmen are less likely to provide labor or materials for use on federal construction projects in the future. This result is not only at odds with the law in other Circuits, but it is contrary to the purpose of the Act. Consequently, a writ of certiorari is necessary to address, and ultimately clarify, this important question of federal law.

Respectfully submitted,

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APPENDIX A - AUGUST 20, 1996 APPELLATE COURT OPINION

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

No. 94-5084.

MACCAFERRI GABIONS, INC.,
Plaintiff-Appellee, Cross-Appellant,

v.

DYNATERIA INC., Moore & Artis, Ltd., Inc., et al.
Defendants, Wilkinson & Jenkins Construction Co., Inc., Ohio Casualty Insurance Company,
Defendants-Appellants, Cross-Appellees,
Robert E. Rupert, Third-Party-Defendant.

Aug. 20, 1996.

Appeals from the United States District Court
for the Southern District of Florida
(No. 88-14152-CIV-KMM),
K. Michael Moore, Judge

Before TJOFLAT, Chief Judge, and RONEY and PHILLIPS[*], Senior Circuit Judges.

* Honorable J. Dickson Phillips, Jr., Senior U.S. Circuit Judge for the Fourth Circuit, sitting by designation.

PHILLIPS, Senior Circuit Judge:

Maccaferri Gabions, Inc. (Maccaferri), a materialman, sued general contractor Wilkinson & Jenkins Construction Co., Inc. (W & J) and its surety, The Ohio Casualty Insurance Co., for the balance due on materials Maccaferri had supplied on a federal construction project. The jury found for Maccaferri on three of its claims, one based on the Miller Act, 40 U.S.C. §§ 270a-270d (1986), one on a third-party beneficiary theory, and one on promissory estoppel and the district court then denied W & J and Ohio Casualty's motions for judgment as a matter of law on each of these claims. W & J and Ohio Casualty now appeal the denial of these motions, as well as the district court's award of prejudgment interest on each of Maccaferri's successful claims. Maccaferri also cross-appeals, seeking an increase in the interest award. We conclude that the lower court erred in denying each of W & J's and Ohio Casualty's appealed Rule 50(a) motions, and we therefore reverse and remand with directions to enter judgment for W & J and Ohio Casualty on all the claims.

I.

This dispute arises out of a shoreline erosion-control project undertaken by the Army Corps of Engineers at Lake Okeechobee, Florida. In 1986, W & J bid for and was awarded the general contract for Section 5 of the project, which involved two large areas on the lake's south shoreline as well as a small test section. Ohio Casualty issued payment and performance bonds for the project.

W & J sub-contracted with Maccaferri after it received the general contract. Maccaferri manufactures gabions, which are

stone- filled wire mesh baskets used in erosion control and other earth- retention projects. The general contract required W & J to use gabions to complete a test section of the project, and it installed Maccaferri's gabions in that section. Maccaferri was paid in full for those materials; no claims arise out of that transaction.

In early 1987, Maccaferri again approached W & J regarding the remaining work on the project. Maccaferri suggested that W & J subcontract some of that work to Moore & Artis (M & A), a contractor with whom Maccaferri previously had dealt. Maccaferri further offered to supply M & A with reduced-price gabions, which it could use to complete the rest of the project. Maccaferri claims that, at a meeting in Tampa attended by representatives of all three parties, both W & J and M & A agreed to use its gabions for all the remaining work; W & J denies ever making such a promise.

Whatever happened, W & J did contract with M & A to do work on the project. Section 3 of their subcontract required W & J to make monthly progress payments to M & A, but specified that those payments would not be due until five days after the Corps had paid W & J for that month's work. M & A also delivered performance and payment bonds to W & J; the sureties on those bonds were James Sugg and Ruben Ham. Another contractor, Dynateria, Inc., who had located these individual sureties, entered into separate contracts by which it, in turn, agreed to indemnify them.

In April of 1987, M & A ordered $574,304.64 worth of gabions from Maccaferri. Maccaferri agreed to supply the gabions, intending to deliver them in installments. In anticipation of performance, Maccaferri procured and stored

the high-strength wire needed to make the mesh baskets, and it further began re-engineering its production line to produce the extra-large gabions needed for the project.

Because of the large size of this order and because Maccaferri was unsure of M & A's creditworthiness, Maccaferri approached W & J and asked it to directly guarantee M & A's payments on the order. W & J refused this request. But, to accommodate Maccaferri, W & J and M & A did eventually modify their subcontract to "allow payment by [W & J] for materials delivered to and provided on the Project by Maccaferri...by bank checks payable to [M & A's escrow agent] Edward W. Bowen, Jr. and Maccaferri...and to be distributed to Maccaferri."

Reassured by this arrangement, Maccaferri delivered on June 2 what was supposed to be the first of several shipments of gabions, for which it billed M & A $132,226.16. When M & A notified it of this charge, W & J included a portion of this fee in its June expense estimate, which it forwarded to the Corps. Although most of the gabions had not yet been incorporated into the project so that the Corps was not contractually bound to pay W & J for their inclusion, the Corps, in its discretion, paid W & J $74,722 of the total billed to M & A for the gabions. W & J, in turn, issued a joint check for the same amount made out to Maccaferri and Bowen. W & J mailed the check to Bowen, who endorsed and forwarded it to Maccaferri.

Under the terms of its agreement with Maccaferri, M & A was supposed to pay for any gabions delivered to the site within thirty days of their delivery. Because it still had not received full payment for its June 2 delivery by July 24, Maccaferri sent M & A a collection letter requesting full

payment of the balance due on its account; it also sent a copy of that letter to W & J.

By mid-August it became apparent that M & A was in serious trouble, and, after M & A failed to meet its August payroll, W & J declared them to be in default and asked their surety, Dynateria, to step-in and complete M & A's work. During the same month, W & J prepared its July expense estimate, in which it included the balance due on the delivered gabions. But the Corps representative with whom W & J discussed this expense said that the Corps would make no more payments for gabions that had not yet been incorporated into the project until it received notice that Maccaferri had been paid for them.

In October, Dynateria and W & J entered into a new subcontract under which Dynateria would take over M & A's contractual obligations. The W & J/Dynateria subcontract contained the following language:

> The Contractor [W & J] agrees to pay the Subcontractor [Dynateria] for the performance of this Subcontract...subject to payments previously made to [M & A] for work under its Subcontract, and further subject to reimbursement to Contractor for labor costs advanced [M & A]..., and payment to Maccaferri Gabions, Inc. in the sum of $57,226.00 for materials delivered and provided on the project for [M & A].

In January of 1988, Dynateria promised Maccaferri that it would pay the remaining balance due and complete the project using only gabions. Unfortunately, Dynateria did neither, and it formally defaulted in October of 1988. W & J then completed the project itself using rip-rap instead of gabions.

Meanwhile, Maccaferri was never paid the balance due on its June, 1987 shipment, nor were a large portion of those gabions ever incorporated into the project. As a result, the Corps never paid W & J for those stored gabions.[1]

Maccaferri began this suit in June of 1988. During the following eight months, Maccaferri twice amended its complaint to add various claims and defendants. By February of 1989, it had included W & J, Ohio Casualty, Dynateria, M & A, and certain individual sureties as defendants. Against all defendants, Maccaferri alleged breach of contract, promissory estoppel, negligence and gross negligence, conversion, and Miller Act claims.[2]

In July of 1989, Maccaferri moved for a preliminary injunction, asking that W & J be forbidden to complete the project without using gabions. The preliminary injunction was denied. After the injunction hearing, Maccaferri filed its third amended complaint, and in the months that followed, the parties filed numerous summary judgment motions. Eventually, Maccaferri, by various means, obtained judgments against M & A, Dynateria, and some individual sureties.

When the smoke had cleared, Maccaferri went to trial against only W & J on the claims of breach of contract, promissory estoppel, conversion, and the Miller Act claim on which Ohio Casualty also remained a defendant. The jury found for W & J on the conversion and direct breach of

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[1] In fact, the Corps eventually back-charged W & J for about $33,000 of the $74,722 it had advanced in July of 1987, because many of the gabions for which this advance had paid were never used in the project.

[2] Maccaferri further alleged breach of suretyship contract against the sureties.

contract claims, but found for Maccaferri on its third-party beneficiary breach of contract, promissory estoppel, and Miller Act claims, and awarded damages as follows: $57,226.16 for the Miller Act claim; $57,226.16 for the third-party beneficiary claim; and $45,800.00 for the promissory estoppel claim.[3] The district court also awarded simple prejudgment interest of 5.49%, which, it concluded, began accruing on July 2, 1987. Thus the district court awarded $48,878.98 interest on both the Miller Act and third-party beneficiary claims, and $39,119.47 interest on the promissory estoppel claim.

These appeals followed, with W & J and Ohio Casualty challenging the judgments against them[4] and Maccaferri challenging the district court's failure to award compound interest on those judgments.

II.

W & J first argues that the district court erred in failing to grant its motion for judgment as a matter of law and thereby dismiss Maccaferri's Miller Act claim. Specifically, W & J contends that because Maccaferri failed to provide it with appropriate notice of its claim for payment within the Act's ninety- day period, see 40 U.S.C. 270b(a), the district court should have directed judgment against Maccaferri on this

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[3] Although the parties do not discuss this point, we assume that the identical awards for the third-party beneficiary and Miller Act claims were intended to cover the same loss -- namely the uncollected balance due on the June 2 delivery -- and that Maccaferri could only recover this amount once.

[4] Because Ohio Casualty's liability is entirely contingent on W & J's, it makes no independent arguments. Thus, our discussion will deal only with W & J's arguments and the determinative question of its liability.

claim. We agree that W & J never was appropriately notified of Maccaferri's claim; accordingly, we reverse.

In reviewing denials of motions for judgment as a matter of law, we apply the same standard applied by the district court, asking whether "the facts and inferences point so strongly and overwhelmingly in favor of one party that a reasonable jury could not arrive at a contrary verdict." *Johns v. Jarrard*, 927 F.2d 551, 557 (11th Cir.1991). In applying that standard we view all the evidence in the light most favorable to Maccaferri as non-movant.

We conclude that under that standard, the evidence was insufficient to establish that Maccaferri satisfied the Miller Act's notice requirement. Under the Miller Act, materialmen on government construction projects who have no direct contractual relation with the general contractor must, in order to establish a right of action against the general contractor's payment bond, give the general contractor sufficient written notice of their claims within ninety days of the last day on which they supplied material for the project. § 270b(a).[5]

Although courts have been somewhat lenient about enforcing the Act's requirements concerning the *method* by which such notice is given, *e.g. Fleisher Engineering & Construction Co. v. United States ex rel. Hallenbeck*, 311

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[5] In relevant part, § 270b provides: [A]ny person having direct contractual relationship with a subcontractor but no contractual relationship...with the [general] contractor...shall have a right of action upon the [general contractor's] payment bond upon giving written notice to said [general] contractor within ninety days from the date on which such person...supplied the last of the material for which the sum claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished.

U.S. 15, 18-19, 61 S.Ct. 81, 83, 85 L.Ed. 12 (1940) (notice sufficient though not sent, as Act requires, via registered mail), they have interpreted more rigidly the Act's requirements for the *contents* of that notice: "[I]t is crucial that the notice state a claim directly against the general contractor, that the claim be stated with some specificity of amount due, and that the claim specify the subcontractor allegedly in arrears." *United States ex rel. Jinks Lumber Co. v. Federal Ins. Co.*, 452 F.2d 485, 488 (5th Cir.1971). Put another way,

> [T]he written notice and accompanying oral statements must inform the general contractor, expressly or impliedly, that the supplier is looking to the general contractor for payment so that "it plainly appears that the nature and state of the indebtedness was brought home to the general contractor."

United States ex rel. Kinlau Sheet Metal Works v. Great Am. Ins. Co., 537 F.2d 222, 223 (5th Cir.1976) (quoting *Houston Fire & Cas. Ins. Co. v. United States ex rel. Trane Co.*, 217 F.2d 727, 730 (5th Cir.1954)). This strictness as to the contents of the notice is driven by the purpose of the notice requirement itself, which is to protect the general contractor by fixing a date beyond which, absent notice, it will not be liable for the subcontractor's debts. *Id.* at 223-24 n. 1.

Here, the parties do not dispute the underlying facts; but they disagree as to whether Maccaferri's actions within the statutory period constitute adequate notice under the Act. The parties agree that Maccaferri last supplied gabions to M & A on June 9, 1987. Accordingly, it had until September 7 to notify W & J of its claim.

Maccaferri points to several occurrences during the statutory period and claims that each one, and all of them by their combined force, put W & J on notice of its claim. Maccaferri first argues that its June 24 collection letter to M & A, a copy of which it sent to W & J, satisfied the notice requirement. The letter was addressed to M & A and was to the point:

> Our idea of a good collection letter is that it should be brief, friendly, and successful. This letter is brief, friendly, and it's [sic] success depends on you. The amount past due is $132,226.16. Thank you.

We conclude that sending a copy of this letter to W & J was insufficient under § 270b(a) to inform W & J that Maccaferri was asserting a claim directly against it. *Kinlau* is instructive on this point. In that case, a supplier mailed the general contractor monthly statements showing the amount the subcontractor owed it. It also eventually mailed the general contractor a copy of a collection letter it had sent to the subcontractor. The district court held that neither the monthly statements nor the copied collection letter constituted sufficient notice to the general contractor under § 270b(a) and on appeal, the Fifth Circuit specifically affirmed this determination. *Kinlau*, 537 F.2d at 224.

Here, as in *Kinlau*, a collection letter addressed to the subcontractor, M & A, though copied to general contractor W & J, did not notify W & J that Maccaferri was looking to it for payment of M & A's debt. Accordingly, the copied collection letter was legally insufficient to satisfy the Act's notice requirement. *See id.*

Maccaferri next claims that the joint-check arrangement between W & J and M & A also constituted sufficient statutory notice to W & J. Specifically, Maccaferri claims that three different aspects of this arrangement separately and together satisfy the notice requirement. First, it suggests that the existence of the agreement itself put W & J on notice that Maccaferri would be looking to it for its payments. Second, Maccaferri claims that W & J's and M & A's modification of their subcontract to permit the joint checks put W & J on notice. Third, Maccaferri suggests that actual payment via joint check constituted notice.

These arguments are meritless. First, as several courts have specifically held, a joint-check arrangement between a general contractor and its subcontractor does not by nature constitute Miller Act notice to the general that an unpaid materialman is making a specific claim for payment. *United States ex rel. San Joaquin Blocklite v. Lloyd E. Tull, Inc.*, 770 F.2d 862, 865 n. 4 (9th Cir.1985); *Bowden v. United States ex rel. Malloy*, 239 F.2d 572, 577 (9th Cir.1956); *United States ex rel. Brothers Builders Supply v. Old World Artisans*, 702 F.Supp. 1561, 1567 (N.D.Ga.1988); *United States ex rel. Fordham v. P.W. Parker, Inc.*, 504 F.Supp. 1066, 1070 n. 3 (D.Md.1980).[6] Accordingly, W & J's and M & A's

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[6] In *United States ex rel. Light & Power Utilities Corp. v. Liles Construction Co.*, 440 F.2d 474 (5th Cir. 1971), the court flirted with the joint-check question presented here in holding that a joint-check arrangement does not create a direct contract between the general and the materialman. This is significant, because, under the Act, the existence of a direct contractual relationship obviates any need for notice. Although *Liles* Certainly offers implicit support for the idea that a joint-check arrangement does not constitute notice -- otherwise it would not matter whether it created a direct contractual relationship or not -- it does not specifically address the notice requirement. *See also United Stats ex rel. State Electric Supply v.*

modification of their own subcontract to reflect the joint-check agreement must also fail to supply the requisite notice. Furthermore, the actual issuance of joint checks does not provide any more notice than the joint-check arrangement itself. See *Bowden*, 239 F.2d 572 (no notice despite issuance of joint checks). Thus, no aspect of the joint-check arrangement provided W & J with the required notice of Maccaferri's claim.

The final event that Maccaferri suggests could constitute Miller Act notice is W & J's preparation of its monthly payment estimate for July of 1987, in which it took account of the delivered gabions. Maccaferri contends that W & J's preparation of this estimate somehow suggests it had Miller Act notice of its claims. We disagree, and conclude, as did the Eighth Circuit in *United States ex rel. American Radiator & Standard Sanitary Corp. v. Northwestern Engineering Co.*, 122 F.2d 600, 603 (8th Cir.1941), that a supplier's submission of invoices that ultimately were incorporated into the general's payment estimate do not, without more, constitute notice under § 270b(a). Because a general's mere awareness of a materialman's outstanding charges against its subcontractor does not automatically notify the general that the materialman is looking to it for payment, we believe the Eighth Circuit's position is sound. Accordingly, we conclude that W & J's use of Maccaferri's invoices in compiling its payment estimate did not somehow amount to notice of its claims under § 270b(a).

Hesselden Constr. Co., 404 F.2d 774 (10th Cir. 1968) (neither joint-check arrangement itself nor the issuing of joint checks establishes direct contract relationship between the general and the materialman; no discussion of notice). Here, neither party contends that the joint-check arrangement created a direct contractual relationship between W & J and Maccaferri.

Finally, Maccaferri urges that the "confluence of circumstances" present here the collection letter, the joint check arrangement and payment, and the payment estimate all combine to at least raise a jury question as to whether W & J received proper notice. We disagree. What is missing here is exactly what § 270b(a) was meant to provide: a clear indication from the materialman that it expects the general contractor to pay the balance due on the subcontractor's debt. *See Jinks Lumber*, 452 F.2d at 488 (prescribing content of § 270b(a) notice). Accordingly, we conclude that there is no evidence from which a rational jury could have concluded that Maccaferri satisfied the Miller Act's notice requirement, *see* Fed.R.Civ.P. 50(a). The district court therefore erred in not granting W & J's motion for judgment as a matter of law as to Maccaferri's Miller Act claim.

III.

W & J next argues that the district court erred in failing to grant its Rule 50(a) motion as to Maccaferri's claim that it was a third- party beneficiary of W & J's subcontracts with M & A and Dynateria. Because we conclude that, as a matter of Florida law, Maccaferri could not recover as a third-party beneficiary of either contract, we agree with W & J and, accordingly, reverse as to that claim.

As explained above, Maccaferri's third-party beneficiary claims were based on two of W & J's subcontracts, those with M & A and Dynateria. We will examine these separately.

A.

We look first at the W & J subcontract with M & A, which requires that we consider both the original subcontract and the

joint-check agreement by which the parties partially modified the original. Maccaferri argues that by virtue of the modification, W & J assumed M & A's duty to pay Maccaferri directly for all materials it delivered to the job site. But W & J argues that, when read together, the two documents merely constitute a standard joint-check agreement, whereby the parties allowed W & J to pay that portion of M & A's charges attributable to Maccaferri's gabions via a joint check made out to both Maccaferri and M & A's escrow agent, Bowen.

We approach this question by looking first to basic rules of contract construction. Under Florida law, as generally, where the language of an agreement is unambiguous, the legal effect of that language is a question of law and, as such, may be declared by the court. *Smith v. State Farm Mutual Automobile Ins. Co.*, 231 So.2d 193, 194 (Fla.1970); *Orkin Exterm. Co. v. F.T.C.*, 849 F.2d 1354, 1360 (11th Cir.1988). But, where a contract is reasonably susceptible to more than one interpretation, it is ambiguous and its meaning is a question for the jury. *Hoffman v. Terry*, 397 So.2d 1184 (Fla.Dist.Ct.App.1981); *Thunderbird Ltd. v. First Fed. Sav. & Loan Ass'n*, 908 F.2d 787, 790 (11th Cir.1990); *Fabrica Italiana Lavorazione Materie Organiche v. Kaiser Aluminum & Chem. Corp.*, 684 F.2d 776, 780 (11th Cir.1982). The initial question whether a contract is or is not ambiguous is itself one of law. *Orkin*, 849 F.2d at 1360; see 10A Charles A. Wright et al., *Federal Practice & Procedure* § 2730.1 at 279 (1983) (stating rule in context of summary judgment). Here, we conclude that on the matter at issue, the relevant documents are, as a matter of law, unambiguous, hence should have been, and may now be interpreted as a matter of law.

Section 3 of the original W & J/M & A subcontract defined those parties' relationship with respect to W & J's

payments on the subcontract. It provided, *inter alia*, for W & J to make monthly progress payments to M & A during the course of its performance. But it expressly limited W & J's payment duties as follows:

> Such [progress] payments shall not become due to [M & A] until 5 days after [W & J] receives payment for such work from the Owner. If [W & J] receives payment from the Owner for less than the full value of materials delivered to the site but not yet incorporated into the work, the amount due to [M & A] on account of such materials delivered to the site shall be proportionately reduced.

Later, W & J and M & A partially modified this agreement "to allow payment by [W & J] for materials delivered to and provided on the Project by Maccaferri" by joint checks payable to Maccaferri and M & A's escrow agent, Bowen. The joint-check modification incorporated by reference the original subcontract; thus, we must construe the two documents together, giving effect, where possible, to all their provisions. *See Guaranty Fin. Servs. v. Ryan*, 928 F.2d 994, 999-1000 (11th Cir.1991) ("'An interpretation that gives a reasonable meaning to all parts of the contract will be preferred to one that leaves portions meaningless'") (quoting *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed.Cir.1983)).

In determining whether these documents, read together, are ambiguous, we first ask whether they are "reasonably susceptible" to Maccaferri's suggested reading that by them W & J undertook an independent obligation to pay it directly for materials it supplied to M & A. We conclude that the documents cannot support such a reading for several reasons.

First, Maccaferri's reading conflicts with other contract provisions that establish the parties' relative duties. Under Section 11(c) of the main subcontract, M & A expressly "obligates" itself "[t]o pay for all materials furnished...under this subcontract." Similarly, Section 12 provides that M & A shall furnish to [W & J] releases of bond rights and lien rights by persons who have furnished...material...in the performance of this Subcontract, it being agreed that payment of money otherwise due [M & A] need not be made by [W & J] until such releases are furnished.

Thus the main subcontract clearly requires M & A, not W & J, to pay materialmen such as Maccaferri, even allowing W & J to withhold payment from M & A if it has not secured releases from those materialmen. Thus reading the joint check agreement as Maccaferri suggests would create a conflict between that agreement and these sections of the contract; such a reading is strongly disfavored, *see Guaranty Financial*, 928 F.2d at 1000 (" "nor should any provision be construed as being in conflict with another unless no other reasonable interpretation is possible' ") (quoting *Johnson Controls*, 713 F.2d at 1555).

Maccaferri's reading would further alter W & J's obligations under its subcontract with M & A by erasing, though only with respect to Maccaferri, important limits on those obligations. Specifically, under Section 3, which defines W & J's payment obligations under the subcontract, W & J is only obligated to make progress payments or final payments to M & A after it has itself received the appropriate payment from the Corps. But Maccaferri's suggested interpretation would read this limitation out of the modified contract, at least with respect to itself, requiring W & J to pay for it directly for

materials whether or not the Corps already has paid W & J for them.

Finally, although the parties could have used the joint-check arrangement specifically to supersede conflicting provisions of the subcontract, the text of the joint-check agreement contains no language effecting such a change. Most critically, the joint- check language itself is non-mandatory; it does not say, for example, "W & J shall hereafter assume M & A's duty to pay all money owing to Maccaferri for its deliveries to the project, all other provisions of the Subcontract notwithstanding." It says rather that the parties "agree to allow," not require, W & J to pay by joint check for Maccaferri's charges. This is hardly language that signals a thoroughgoing change in the parties' duties. Accordingly, we conclude that these agreements do not support Maccaferri's suggested reading. We further conclude that the only reasonable reading of these documents, one which gives effect to all their terms, is as follows: As W & J's duty to pay M & A accrued under the subcontract *i.e.*, as it received the appropriate payments from the government it could pay for that portion of M & A's fee attributable to Maccaferri's materials by joint check made out to Maccaferri and Bowen.[7]

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[7] We note that the parties acted on this agreement as it applied to charges due in June of 1987. In that month, W & J presented to the government its payment estimate, which requested payment for M & A's charges, $74,947.98 of which was attributable to gabions Maccaferri had delivered to the site. The government paid this request in full, and after receiving this payment W & J issued a check payable to Bowen and Maccaferri for this amount. Bowen endorsed the check and forwarded it to Maccaferri. Thus, as W & J's duty to pay M & A was activated by its own receipt of funds from the government, W & J -- as allowed by the joint-check arrangement -- paid a portion of those funds by joint check, the proceeds of which ultimately

Having determined the meaning of the contract language in question, we must now determine whether that language creates in Maccaferri any presently-enforceable third-party rights against W & J. We conclude that it does not.

Under Florida law, a third party may enforce an agreement between others only if it is an intended beneficiary, not an incidental beneficiary, of that agreement. *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277, 279 (Fla.1985). Furthermore, "[a] party is an intended beneficiary only if the parties to the contract clearly express, or the contract itself expresses, an intent to primarily and directly benefit the third party." *Caretta Trucking, Inc. v. Cheoy Lee Shipyards, Ltd.*, 647 So.2d 1028, 1031 (Fla.Dist.Ct.App.1994). There can be no doubt that this agreement did bestow some benefit on Maccaferri; by agreeing to allow payments in the form of joint checks, the parties gave Maccaferri greater assurance that it would actually receive whatever funds W & J gave M & A to pay for Maccaferri's materials. Although it is unclear whether this benefit was "primary" or "direct" enough under Florida law to make Maccaferri a true third-party beneficiary of this contract, we assume only arguendo that the agreement did create a third-party beneficiary arrangement.

But as a third-party beneficiary of the W & J/M & A subcontract, Maccaferri's rights against W & J not only sprang from that agreement, but also were limited by its terms. To that effect, Florida has announced the following rule: "It is clear that a third- party beneficiary's right to enforce a contract cannot "rise higher than the rights of the contracting party through whom he claims.'" *Maryland Casualty Co. v. Department of Gen. Servs.*, 489 So.2d 54, 57

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were distributed to Maccaferri.

(Fla.Dist.Ct.App.1986) (quoting *Crabtree v. Aetna Casualty & Surety Co.*, 438 So.2d 102, 105 (Fla.Dist.Ct.App.1983)); see also 11 Fla.Jur.2d *Contracts* § 153, at 462 (1981) (stating this general rule).

Based on this rule, W & J argued at trial and again on appeal that Maccaferri could not, as a matter of law, recover against it as a third party beneficiary. It points out that, as explained above, M & A's right to receive progress payments for a period did not accrue until after the government paid W & J the money due for that period. Furthermore, the undisputed testimony at trial was that, after paying W & J's June estimate, the government made no more payments attributable to Maccaferri's gabions.[8]

It appears that the Corps was concerned about releasing any more funds for stored materials without being certain that those materials would in fact be used in the project. The

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[8] When W & J prepared its July payment estimate, it originally requested payment for the balance due Maccaferri. According to the trial testimony of W & J's co-owner, William Wilkinson, when W & J spoke with a Corps representative regarding whether the corps would pay for these gabions, which were on site but had not been incorporated into the project, the representative explained that the Corps would make no more payments for such materials without first receiving proof that Maccaferri had been paid for them.

It appears that the Corps was concerned about releasing any more funds for stored materials without being certain that those materials would in fact be used in the project. The Corps seemed to have reasoned that if someone performing the job had itself paid for the materials, it would be much more likely to actually use them on the job. At any rate, because neither M & A nor Dynateria ever paid Maccaferri for these materials, Wilkinson explained, W & J never received a payment notice that it could forward to the Corps. As a result, the Corps never released funds to cover the gabions that had been delivered, but not installed.

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We agree with this analysis. Thus, to the extent that the W & J/M & A subcontract, including the joint-check agreement, created any third-party rights in Maccaferri, the limits those very agreements placed on its rights prohibit Maccaferri from recovering against W & J the unpaid balance due on the gabions it delivered.

B.

The other contract from which Maccaferri might have gained third-party rights is the subcontract between W & J and Dynateria. We conclude that this contract gave Maccaferri no rights against W & J. When M & A defaulted on its subcontract, W & J called on its performance surety, Dynateria, to assume M & A's obligations. W & J and Dynateria then entered into a written subcontract, under which

Dynateria essentially agreed to pick up where M & A left off. W & J for its part promised to pay Dynateria for its work, but it expressly conditioned its payment obligations as follows:

> [W & J] agrees to pay [Dynateria] for the performance of this Subcontract...subject to payments previously made to [M & A] for work under its Subcontract..., and further subject to reimbursement to [W & J] for labor costs advanced to [M & A] in the sum of $13,150.00, and payment to Maccaferri Gabions, Inc. in the sum of $57,226.00 for materials delivered to and provided on the project for [M & A].

The parties, of course, disagree as to the meaning of this language. According to Maccaferri, the agreement anticipates that W & J itself will pay M & A's debt to Maccaferri, and Dynateria will thereafter reimburse W & J for that payment. W & J, on the other hand, reads it as requiring Dynateria to discharge M & A's unfulfilled duties, including its duty to reimburse W & J for money previously advanced to M & A, and its duty to pay the balance due on Maccaferri's account. Again, we find that the document is unambiguous and will not reasonably support Maccaferri's proposed reading. *See Smith*, 231 So.2d at 194. Thus, we may, and do, declare its meaning as a matter of law. *See id.*; *Orkin*, 848 F.2d at 1360. Again, we are mindful of the need to give effect to the entire agreement and to avoid an interpretation that creates an unnecessary conflict between its terms. *See Guaranty Financial*, 928 F.2d at 1000.

We read the agreement as expressly conditioning W & J's duty to pay Dynateria on the latter's assumption of M & A's duties. To that effect, it reduces the amount that will be due Dynateria by amounts already paid to M & A and further

conditions payment on Dynateria's performance of two specific tasks: (1) reimbursement of funds W & J advanced to M & A, and (2) payment of the balance due to Maccaferri on its materials contract with M & A. Both of these are actions that, had M & A not defaulted, would have been due from it, but are now expected from its performance surety, Dynateria.

The factual background from which the agreement arose, as expressed by its own preface, confirms our understanding that Dynateria was taking over M & A's duties, including its duty to pay Maccaferri. The agreement recites the fact that M & A was originally hired as the subcontractor, that it took out a performance bond covering its work, that it defaulted on the contract, and that Dynateria now wishes to subcontract with W & J for performance under the same prime contract under which M & A began its work. Furthermore, Section 11(c) of the new subcontract, like the identical one in the W & J/M & A subcontract, specifically requires Dynateria to "pay for all materials furnished ... under this Subcontract"; such materials would, of course, include Maccaferri's gabions.

Accordingly, it is clear under the plain language of the subcontract that Dynateria, who was M & A's surety, intended to take over M & A's duties under that subcontract; one of those duties, as specified in the agreement, was to pay the balance due Maccaferri. As a result the only promise in this agreement that could have given rise to third-party rights in Maccaferri came not from W & J, but from Dynateria. Thus, assuming it had such rights, the only party against whom Maccaferri could enforce them is Dynateria.

Maccaferri, of course, suggests a different reading of the agreement. Maccaferri reads Section 3 of the agreement as conditioning W & J's payment duties on Dynateria's

reimbursement of W & J for (1) costs W & J has advanced to M & A which is consistent with our own reading and (2) W & J's own payment to Maccaferri for the delivered materials. Thus, Maccaferri's reading suggests that W & J has itself assumed M & A's duty to pay Maccaferri, and will not pay Dynateria until it reimburses W & J for those materials payments. Such a reading, while not grammatically impossible, risks invalidating the agreement as a whole and conflicts with the other contract provisions mentioned above.

First, Maccaferri's reading would possibly invalidate the contract by rendering W & J's payment promise illusory. Reading the language as making W & J's payment duties "subject to [Dynateria's] reimbursement for" W & J's future payment of Maccaferri's fees would make W & J's own payment of Maccaferri a condition precedent to its duty to pay Dynateria. Put differently, if W & J never paid Maccaferri which it had no independent legal obligation to do then Dynateria could never reimburse W & J for that payment, thus never triggering W & J's duty to pay Dynateria for its work. Such a "promise" by W & J, to pay Dynateria under conditions it alone controls, would be illusory and would not constitute consideration for Dynateria's counter- promise to perform. *See Pan-Am Tobacco Corp. v. Department of Corrections*, 471 So.2d 4, 5 (Fla.1984) (contract is illusory and unenforceable "[w]here one party retains for itself the option of fulfilling or declining to fulfill its obligations under the contract"); *Restatement (Second) of Contracts* §§ 77, 2 cmt. e (promise conditioned on non- mandatory performance of promisor himself is not consideration).

In other words, such an interpretation would destroy the mutuality of obligation under the contract. Under Florida law, as generally, a contract clause should not be interpreted in

such a way as to destroy mutuality of obligation and, thereby, invalidate the contract. *See American Medical Int'l v. Scheller*, 462 So.2d 1, 8 (Fla.Dist.Ct.App.1984) (refusing to adopt interpretation of contract that would render it void for lack of mutuality). If instead, the language is read -- as we conclude it must be -- as requiring Dynateria itself to pay Maccaferri in order to trigger W & J's payment duty, then W & J cannot control the occurrence of a condition precedent to accrual of its payment duty, thus making the parties' promises mutual and non-illusory.

We also note that finding in this subcontract an undertaking by W & J itself to pay Maccaferri would be inconsistent with the duties of the parties specified elsewhere in the contract. As mentioned above, Section 11(c) of the subcontract requires Dynateria, not W & J, to pay all materialmen; furthermore, Section 12 requires Dynateria to deliver its work to W & J "free from all claims, encumbrances, or liens," including those from materialmen. Thus because the contract otherwise requires Dynateria to pay all materialmen, it would be strange for W & J itself to undertake such a duty to one of Dynateria's primary materialmen, especially in the rather indirect way Maccaferri argues it did.

Accordingly, we conclude that the only legally supportable reading of Section 3 of the subcontract, in light of the entire agreement, is that it obligated Dynateria, not W & J, to pay the balance due Maccaferri under its materials contract with M & A. Thus Maccaferri could not, as a possible third-party beneficiary of Dynateria's promise, enforce that promise against W & J.

Because Maccaferri also cannot recover against W & J as an intended beneficiary of the W & J/M & A subcontract, we

conclude that it was error to deny W & J's motion for judgment as a matter of law on Maccaferri's third-party beneficiary claims.

IV.

W & J next claims that the district court erred in failing to grant its Rule 50(a) motion with respect to Maccaferri's promissory estoppel claim. Specifically, it contends that, because Maccaferri introduced no evidence that W & J ever promised to complete the Lake Okeechobee project using only gabions, Maccaferri cannot now claim that it relied on such a non- existent promise in incurring costs necessary to produce a large number of gabions for the project. We agree with W & J that Maccaferri presented no evidence of such a promise by W & J itself, hence conclude that the district court erred in denying W & J's motion for judgment as a matter of law on that claim.

Florida has adopted the familiar formulation of the promissory estoppel rule stated in Section 90(1) of the *Restatement (Second) of Contracts*:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcing the promise.

See W.R. Grace & Co. v. Geodata Servs., Inc., 547 So.2d 919, 924 (Fla.1989) (quoting § 90(1)). It is axiomatic that a plaintiff cannot recover for reasonable, detrimental reliance on a promise without proving that the defendant made the

promise. *See id.* (denying promissory estoppel claim for failure to sufficiently prove existence of promise).

We have examined each item in the record to which Maccaferri points as evidence of a promise by W & J to complete the entire project using gabions and find no sufficient proof of any such promise. First, Maccaferri claims that W & J made its promise to use only gabions during preliminary contract negotiations between it, W & J, and M & A. On this point, the testimonies of two participants at these negotiations William Wilkinson and George Ragazzo, Maccaferri's special projects manager were presented at trial. Wilkinson admitted that the parties did negotiate regarding the project and that M & A eventually quoted him a price for its work. But Wilkinson never mentioned making any promise to Maccaferri that the project would be completed with gabions only. Interestingly, although Maccaferri's counsel examined Wilkinson twice during the trial, he never questioned Wilkinson regarding specific discussions at this meeting. Thus Wilkinson's testimony does not disclose any promise on which Maccaferri could base its estoppel claim.

Likewise, Ragazzo's testimony which was read to the jury from the transcript of an earlier proceeding mentions no promises made by W & J to Maccaferri. Although Ragazzo did testify that "someone" promised him that the project would be completed entirely with gabions, the only someone named in that portion of his testimony is Dynateria. In the absence of proof that Dynateria was somehow acting as W & J's agent when it made this statement, this promise could not be found made by W & J itself. Thus Ragazzo's testimony is no help to Maccaferri on this point.

Maccaferri further claims that a number of documents prove that W & J promised to use its gabions for the entire project.[9] Although these documents reveal many things that M & A contracted with Maccaferri, that Maccaferri delivered gabions to the site, that W & J knew the gabions had been delivered, etc. they are devoid of any reference to a promise by W & J on which Maccaferri could have relied in amassing the materials needed to produce all the gabions.

Because Maccaferri presented no evidence that W & J itself ever promised to use only gabions in constructing the Lake Okeechobee project, the district court erred in denying W & J's motion for judgment as a matter of law on Maccaferri's promissory estoppel claim.

V.

In view of our holdings that all of Maccaferri's claims should have been dismissed as a matter of law, the parties' several claims respecting the appropriate interest on the judgment now to be vacated are moot.

VI.

For the reasons discussed above, we REVERSE the district court's orders denying W & J's and Ohio Casualty's

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[9] The documents include: (1) the W & J/M & A subcontract, which mentions gabions as one material that M & A could use in its work; (2) M & A's purchase order for $574,304.64 worth of gabions; (3) Maccaferri's letter informing W & J of the specifications of the gabions it was supplying; (4) W & J's certification to the Corps of Engineers that Maccaferri had delivered $132,226.15 worth of gabions to the site; (5) the W & J/M & A joint-check agreement; (6) Dynateria's letter to Maccaferri promising to use the gabions to complete its work on the project.

Rule 50(a) motions and REMAND with directions to enter judgment in favor of W & J and Ohio Casualty dismissing all of Maccaferri's claims.

SO ORDERED.

APPENDIX B - NOVEMBER 14, 1996 APPELLATE COURT ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

No. 94-5084.

MACCAFERRI GABIONS, INC.,
Plaintiff-Appellee, Cross-Appellant,

v.

DYNATERIA INC., Moore & Artis, Ltd., Inc., et al.
Defendants, Wilkinson & Jenkins Construction Co., Inc., Ohio Casualty Insurance Company,
Defendants-Appellants, Cross-Appellees,
Robert E. Rupert, Third-Party-Defendant.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) FOR REHEARING EN BANC

Before TJOFLAT, Chief Judge, and RONEY and PHILLIPS[*], Senior Circuit Judges.

*Honorable J. Dickson Phillips, Jr., Senior U.S. Circuit Judge for the Fourth Circuit, sitting by designation.

PER CURIAM:

Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/

UNITED STATES CIRCUIT JUDGE

APPENDIX C - JUNE 1, 1995 ORDER ON REMAND AMENDING FINAL JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MACCAFERRI GABIONS, INC.,
Plaintiff.

v.

DYNATERIA, INC., et al.,
Defendants.

Case No. 88-14152-CIV-MOORE

ORDER ON REMAND AMENDING
FINAL JUDGMENT

THIS CAUSE came before the Court on the Eleventh Circuit's Limited Remand to this Court to address Plaintiff's Motion to Correct Clerical Errors in the Final Judgment (Remand Entered April 18, 1995 in the Eleventh Circuit Court of Appeals Case No. 94-5084)

THE COURT has considered the Limited Remand, the underlying Motion to Correct Clerical Errors in Final Judgment (DE # 320), and the pertinent portions of the record, and being otherwise fully advised in the premises, it enters the following order:

DISCUSSION

Plaintiff's Motion to Correct Clerical Errors in Final Judgment was filed in this Court on October 28, 1994. On October 18, 1994, the Defendants in this matter had filed their Notice of Appeal with the Eleventh Circuit Court of Appeals, and within two days, this case was docketed with the Eleventh Circuit under Case Number 94-5084. As stated in the January 18, 1995 Order, this Court lacked jurisdiction over the Motion at that time. The Court also stated in that Order that if the Court of Appeals were to remand the matter to this Court, the Court would be inclined to grant Plaintiff's motion.

CONCLUSION

The limited remand of the Court of Appeals has vested this Court with jurisdiction to resolve Plaintiff's Motion to Correct Clerical Errors in Final Judgment. Consistent with this Court's statements in its January 18, 1995 Order, Plaintiff's Motion to Correct Clerical Errors in Final Judgment is GRANTED.

Therefore, it is hereby

ORDERED AND ADJUDGED that this Court's August 13, 1994 Final Judgment be amended and modified by this Order consistent with the following terms:

(1) Plaintiff Maccaferri Gabions, Inc. shall recover from Defendant Wilkinson & Jenkins Construction Co., Inc. and Ohio Casualty Insurance Co., Inc., jointly and severally, the sum of $57,226.16 on its claim arising under the Miller Act, 40 U.S.C. § 270a et seq., with $48,878.98 in simple prejudgment interest, and postjudgment interest on the award

at a rate of 5.49%.

(2) Plaintiff Maccaferri Gabions, Inc. shall recover from Defendant Wilkinson & Jenkins Construction Co., Inc. the sum of $57,226.16 on its breach of third-party beneficiary claim, with $48,878.98 in simple prejudgment interest, and postjudgment interest on the award at a rate of 5.49%.

FURTHER ORDERED that Plaintiff Maccaferri Gabions, Inc. recover from Defendant Wilkinson & Jenkins Construction Co. The sum of $45,800.00 in actual damages on its promissory estoppel claim, $39,119.47 in simple prejudgment interest, and postjudgment interest on the award at a rate of 5.45%.

DONE AND ORDERED in Chambers at Miami, Florida this 1st day of June, 1995.

/s/

_____

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:

Larry Klayman, Esq.
Joseph W. Lawrence, III, Esq.
CaCelia Williams, Deputy Clerk of
U.S. Court of Appeals -- Eleventh Circuit

APPENDIX D - AUGUST 24, 1994
FINAL JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

MACCAFERRI GABIONS, INC.,
Plaintiff.

v.

DYNATERIA, INC., et al.,
Defendants.

Case No. 88-14152-CIV-MOORE

FINAL JUDGMENT

THIS CAUSE came before the Court following a jury verdict of July 15, 1994. Accordingly, it is

ORDERED AND ADJUDGED that Plaintiff Maccaferri Gabions, Inc. recover from the Defendant Wilkinson & Jenkins Construction Co., Inc. and Ohio Casualty Insurance Co., Inc., jointly and severally the sum of $57,226.16 in actual damages in its breach of third-party beneficiary claim, $48,878.98 in simple prejudgment interest, and postjudgment interest on the award at a rate of 5.49%.

FURTHER ORDERED that Plaintiff Maccaferri Gabions, Inc. recover from Defendant Wilkinson & Jenkins Construction Co. the sum of $45,800.00 in actual damages on its promissory estoppel claim, $39,119.47 in simple

prejudgment interest, and postjudgment interest on the award at a rate of 5.49%

FURTHER ORDERED that costs and attorney's fees will be taxed at a later dated upon appropriate motion supported by affidavits.

FURTHER ORDERED that all pending Motions not otherwise ruled upon a DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida this 12th day of August, 1994.

/s/

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

copies provided:

Benjamin N. Thompson, Esq.
Larry Klayman, Esq.
Joseph W. Lawrence, III, Esq.
Bobby G. Deaver, Esq.
United States Magistrate Judge
Linnea R. Johnson

APPENDIX D - JULY 24, 1987
COLLECTION LETTER

July 24, 1987

Mr. Sherman Artis
Moore & Artis, Ltd.
345 Fairview Road
Ellenwood, Georgia 30049

Dear Mr. Artis:

Our idea of a good collection letter is that it should be brief, friendly, and successful.

This letter is brief, friendly, and it's success depends on you.

The amount past due is $132,226.16.

Thank you.

Very Truly Yours
/s/
THOMAS M. HINES
Manager
Credit & Collections

P.S. Duplicate invoices enclosed

C: Mr. W.C. Wilkinson, President
Wilkinson & Jenkins Construction Co., Inc.
4530 Chancellor St., N.E.
St. Petersburg, Florida 33703